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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 84

UNITED STATES OF AMERICA,
Appellant,

v.

MILAN VUITCH,
Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

**BRIEF OF DR. WILLIAM F. COLLITON, JR.,
AND OTHER DISTRICT OF COLUMBIA PHYSICIANS,
AMICI CURIAE IN SUPPORT OF APPELLANT**

INTRODUCTORY STATEMENT

The few facts of record in this case, the pertinent District of Columbia statute and the opinion of the court below¹ are found in the brief filed by the United States. These *amici*, all of whom are identified in the footnote,² accept them for

¹The District Court's opinion is officially reported at 305 F. Supp. 1032 (D. D.C., 1969).

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the purposes of their own brief. Both parties have given their written consents to the filing of this *amici curiae* brief. These have been filed with the Clerk.

INTEREST OF THE AMICI AND THEIR POSITION IN THE CASE

1. *Interest of the Amici.* All of the *amici* are doctors licensed to practice medicine in the District of Columbia. Most of them are obstetricians, gynecologists, internists or surgeons with considerable experience in the practice of their respective specialties. Several of them serve on the faculties of local medical schools, and some are on the staffs of various hospitals in the District of Columbia.

The *amici* do not maintain or imply that the position which they espouse in this brief represents the unanimous, or even the majority, opinion held by doctors who practice medicine in the District of Columbia.³ However, as practicing physicians, these *amici* are called upon from time to time for medical advice and professional assistance with respect to terminating an unwanted pregnancy. Whatever the final determination of the Court in this case may be, its ruling will necessarily affect and, to some extent, control the medical practice and professional conduct of these *amici*, as well as all other doctors practicing medicine in the District of Columbia. Clearly, the law's treatment of a recurring aspect of their medical practice is a matter of substantial professional interest to them and one on which, we believe, they are entitled to be heard in this litigation.

2. *The Position of the Amici on the Issues.* As will appear, these *amici* support the United States in maintaining that the relevant statute⁴ is not unconstitutionally vague on

³The members of the District of Columbia Medical Society obviously have differing opinions on the general questions upon which this case touches. *Washington Post*, June 24, 1970, p. C-1. The same strong division of medical opinion exists within the American Medical Association. *New York Times*, June 26, 1970, p. 1; *Washington Post*, June 26, 1970, p. A-1.

⁴22 D.C. Code 201 (1967).

its face. Additionally, however, there may arise other issues which were raised by the defendant in the court below and which he again presses in this Court. These include his claims that the statute: (1) abridges First and Fifth Amendment rights of doctors and (2) unconstitutionally invades certain rights of privacy and family interests allegedly guaranteed by the Constitution, because the law does not rest on any substantial competing state interest sufficient to justify its existence and application.⁵

It is the understanding of these *amici* that the Solicitor General does not intend to deal with this second category of constitutional issues. We share his opinion that such issues need not be reached and also, as we argue below, should not be decided on the sparse record which furnishes the "fragile . . . foundation" on which this appeal is grounded. *Poe v. Ullman*, 367 U.S. 497, 501 (1961). Nevertheless, the defendant did raise them, at least in a general way, in his motion to dismiss the indictment (A. 4). While the District Court judge did not pass upon these issues, he did acknowledge, with some favor, their assertion by the defendant (A. 6, 8). Thus, they may be open to the defendant as grounds on which he might rely in supporting the trial court's decision on the Government's appeal to this Court. *Anderson v. Atherton*, 302 U.S. 643 (1937); *United States v. American Express Co.*, 265 U.S. 425, 435-36 (1924); but cf. *United States v. Blue*, 384 U.S. 251, 256 (1966); Stern & Gressman, *Supreme Court Practice* 41-42 (1969).

The instant case then is an appropriate one for these *amici* to attempt to offer assistance to the Court in reaching its decision, especially since there may lurk in the record important constitutional issues which the Court may wish to take up and decide, but to which the appellant may not direct argument.⁶

⁵Appellee's Motion To Affirm, p. 26.

⁶Krislov, *The Amicus Brief: From Friendship to Advocacy*, 72 Yale L.J. 694, 715 (1963); Wiener, *Briefing and Arguing Federal Appeals* 270 (1961).

QUESTIONS PRESENTED

As *amici* see it, the determinative question presented is, as stated by the Solicitor General, whether the phrase "necessary for the preservation of the mother's life or health" contained in the District of Columbia abortion statute is unconstitutionally vague on its face. However, the Court also may be called upon to decide: (a) whether it should pass upon the further constitutional issues urged upon it by the appellee, and, if so, (b) whether the statute, on its face, abridges or impairs rights guaranteed doctors by the First and Fifth Amendments and rights of privacy of pregnant women provided by virtue of the interaction of the Fourth, Fifth and Ninth Amendments to the Constitution of the United States.

As they argue below, *amici* believe that the answer to all three of these questions should be in the negative.

SUMMARY OF ARGUMENT

I.

A. The claim that the statute is unconstitutionally vague should not be determined on the basis of the present record, completely unilluminated by any facts. For the Court to decide that issue would be the type of precipitate and unnecessary judicial consideration of a constitutional question which this Court has traditionally avoided.

B. The phrase "necessary for the preservation of the mother's life or health" has been interpreted by the Circuit Court of Appeals for the District of Columbia to protect the physician who concludes in good faith that an abortion is necessary to preserve the mother's life or health, including mental health. The doctors of the District of Columbia are neither in doubt nor in fear as to where abortions permitted by the statute end and where those prohibited by it begin. The standard of "preservation of life or health" is the same standard which a doctor applies in making medical judgments in almost every aspect of his practice. The defendant could

not have been in any genuine doubt whether he was acting as a doctor or as an abortionist.

II.

A. We have the gravest doubts that a purported abortionist has the proper standing to assert alleged, but as yet unestablished, rights of privacy on the part of pregnant women. In the absence of weighty countervailing policies, a litigant may only assert his own constitutional rights or immunities. No woman, pregnant or not, married or single, is a party to this litigation. Indeed, the record may show that the defendant performed an abortion on a woman who could turn out to be the chief complaining witness against him. It would appear ironic, if not offensive, to recognize any right in the defendant to raise vicariously the constitutional rights of pregnant women in the District of Columbia.

B. The appellee urges the Court to decide novel constitutional issues of great magnitude, the resolution of which will have a nationwide impact upon the law, the practice of medicine and the social mores of the people. Yet, the present record is utterly inadequate to permit the sort of informed and responsible adjudication which alone can support the enunciation of the far-reaching, new constitutional principle which the appellee urges the Court to proclaim. Completely missing are any of the specific facts on which the offense charged is based. In addition, there is a complete lack in the record of any medical, social, economic or other relevant facts which bear on the question of whether the Constitution should be construed to vest in a pregnant woman the unfettered right to destroy her unborn child for any reason whatsoever.

C. The prematurity for decision of the issues that appellee would have the Court resolve on the barren record in this case is further compounded by two other circumstances. First, since the case has come here by direct review, this Court has not had the advantage of the view of the United States Court of Appeals for the District of Columbia Circuit. Direct appeals are not favored. This is especially true when a

direct appeal raises issues which were never passed on in the single court which heard the case prior to its arrival in this Court. Moreover, the Court will have opportunity soon enough to pass on the question of whether the Constitution confers on a woman the unabridgeable right to terminate an unwanted pregnancy. One such case is already pending in this Court. Nine other cases which raise the same constitutional issues advanced by the appellee are now in various stages of litigation in the federal and state courts.

III.

A. Whatever the metaphysical view, the legal concepts as to the nature and rights of an unborn child have drastically changed, based on expanding medical knowledge over the last 2,500 years. As recently as 1921, a respected state court could maintain that the child in the womb is part of his mother. The findings of medical science have destroyed that myth. The leading doctors and scientists in the field now agree that life begins not at birth, but either at conception or within six or seven days thereafter. They further agree that a developing fetus is alive, not only in the sense that he is composed of living tissue, but also in the sense that he is a living, striving human being, from the very beginning. Very early in the pregnancy the fetus manifests a working heart and brain different from his mother. There is no question but that his individual animate existence, or life, begins no later than the stage at which the cells which make up the fetus separate from those cells which later become the placenta. Thus, the state's interest in the preservation of human life in the womb rests upon the undisputed medical evidence.

B. The law has recognized the rights of an unborn child in other important areas. For example, the property rights of an unborn child, at all stages of fetal development, were recognized by English law before the end of the eighteenth century. The same recognition was afforded the property rights of an unborn child by American courts. In property law there was no requirement that the fetus must be "quick",

i.e., that his presence within her body be felt or recognized by the mother. The rules protecting property rights of an unborn child have been applied even where their application benefited some third party rather than the child, and even where the child himself suffered disadvantage because of such application. We believe it would be an ironic and inexplicable perversion of both human and constitutional values if it were to be the law that a state has an interest in protecting the property rights of an unborn child but has no compelling, constitutionally justifiable interest in regulating the circumstances and conditions under which he may be destroyed.

C. In the field of tort law there has been a dramatic development and complete change in the law in response to expanding scientific knowledge and medical facts that formerly were unavailable. Until well into the twentieth century most American decisions denied recovery in tort to the human offspring harmed in the womb, primarily on the ground that the defendant owed no duty to a person who was not in existence at the time of the tort. The premise here, of course, was the now repudiated notion that the unborn child was a part of his mother. Almost every jurisdiction which has considered the issue in the last 30 years has upheld the right of an infant to sue for injuries sustained prior to birth, including the right to sue under a wrongful death statute, whether or not the injury occurred at the time the unborn child was viable or not. If the state may protect the unborn child by a court action awarding damages for a tort, *a fortiori* it cannot be impotent to protect the same living being by criminal sanctions which prohibit his arbitrary destruction.

D. It is also now established that the law will recognize an unborn child's right to support by his parents. If a state has sufficient justification to require a father to support an unborn child which he may not want, can it be fairly maintained that the same state has no justifiable interest in protecting from destruction as a living being a child which his mother may not want?

E. This Court has firmly settled that the free exercise of religion rights guaranteed by the First Amendment are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. Nevertheless, the right of an unborn child to live has served to permit the state's abridgement of or interference with a mother's religious convictions when necessary to save the life of an unborn child. These are cases where the court has to override the religious convictions of a mother and order a blood transfusion in order to save an unborn child within the womb. Either expressly or impliedly such judicial results are based on the findings of modern medical science concerning the nature of the fetus and constitute recognition of the right of the child in the womb to the protection of the law.

F. The *amici* believe that in any balancing of constitutional values or rights, life must be preserved over alleged privacy. Even if there is a certain right of privacy on the part of a woman arising from the marital relationship, with which the state cannot unjustifiably interfere, there is another right involved here, and the most fundamental of the personal liberties protected by the Due Process Clause, *i.e.*, the unborn child's right not to "be deprived of life", in the very words of that constitutional provision. Thus, the Court is not confronted with a balancing between a right of personal liberty on the one hand and some lesser competing state interest on the other. The choice here is between a nebulous and as yet unrecognized legal right of privacy on the part of a woman with respect to the use of her body and the personal right to life of an unborn child, with a concomitant right on the part of a state to prevent its unjustifiable destruction.

The state's interest in regulating abortion is not bottomed exclusively on its concern for the health of the mother. The state interest which justifies what the Congress had done rests on concern for the preservation of human life, even though that life be within the womb. There are no decisions of this Court which suggest the existence of an unrestricted right of body integrity on the part of a woman sufficient to permit

her alone to decide, for whatever reason, whether to terminate a pregnancy. To sustain the attack on the statute which the appellee makes in urging that it offends against an alleged right of privacy would require this Court's unabashed return to the long-repudiated concept of substantive due process which plagued its decisions for several generations.

Public and medical opinion with respect to liberalization of the abortion laws is divided. However, the predilections of the populace, even those of its most enlightened members, much less the individual preferences of judges, cannot serve as a basis to strike down legislation within the competence of a state to enact, especially when such legislation is aimed at protecting the most fundamental of the personal liberties protected by the Due Process Clause, that is, the right not to "be deprived of life."

G. All the cases cited by the appellee in support of his claim that a right of privacy is constitutionally guaranteed are clearly distinguishable on their facts. The only one that even superficially might be regarded as an analogy to support appellee's position here is *Griswold v. Connecticut*, 381 U.S. 479 (1965). *Griswold* stands only for the proposition that a law outlawing the use of contraceptives, enforcement of which would require invasion of the marital bedroom, transgressed on the intimacies of and the right of privacy inherent in the marital relationship, including the sexual relationship. The District of Columbia abortion statute does not affect the sexual relationships of husband and wife. Moreover, in *Griswold* the Court was not called upon to choose between the right to privacy and the right to life, the choice it must make in this case. Nor can it seriously be argued that abortion, a crime at common law, is a fundamental, albeit "penumbral", liberty reserved by the Ninth Amendment.

IV.

A. The appellee's claims that the statute abridges his First and Fifth Amendment rights are without merit. He was indicted for performing an abortion, not for making a speech or giving medical advice. If the statute is one within the competency of the District of Columbia to enact, then argument is closed, since a criminal act does not fall within the freedom of speech which the First Amendment protects. The same rationale answers the appellee's claim that he is unconstitutionally restrained in the practice of his profession.

B. Nor does the statute effect any invidious discrimination between rich and poor, as suggested by the appellee. It applies to all persons committing the acts condemned by it and there is no suggestion that it seeks to discriminate on any invidious basis, including that of income. Even if it is true that the rich are in a better position to go to a jurisdiction where abortions are legal or to engage the services of more sympathetic physicians, the answer would be no different. There is no requirement of equal protection that all evils of the same genus be eradicated, or none at all. If the law in this instance, as in so many others, bears more oppressively on the less financially fortunate, the remedy lies in the elimination of the causes of poverty and the reform of the administration of criminal justice, not by the selective invalidation of otherwise lawfully enacted statutes.

C. The appellee argues that the common welfare would be better served by a liberal abortion law. He is concerned about the unsafe conditions which surround criminal abortions and is also moved by the grave problem of overpopulation. Whatever the efficacy of such arguments, it is to the Congress, not to this Court, that they should be directed. Apart from that, the *amici* question their persuasiveness. The evidence is that liberalization of abortion laws has effected no reduction in the rate of abortions in other countries, so all that is done is to increase the total number of abortions. Finally, so far as the problem of overpopulation is concerned, an abortion, whether on the free demand of a woman or pursuant to the

intimidating command of the state, appears to us as a singularly ineffective, and indeed extremely dangerous, way to attempt to solve the population problem, at least in the context of the humanistic values traditional to Western Civilization. In any event, this Court is not the forum, and this case is not the occasion, to debate whether unrestricted abortion would best serve the general welfare of the people of the District of Columbia.

ARGUMENT

I.

THE STATUTE IS NOT UNCONSTITUTIONALLY VAGUE

A. *The Question Should Be Illumined by Some Facts.* The amici cannot offer arguments of additional substance to those which the Solicitor General has made in challenging the decision of the court below on the vagueness issue. They agree with the Government's contention that the statute should not have been held unconstitutionally vague on its face. Rather, as the Solicitor General urges, the case should be remanded for further proceedings in the trial court to determine whether the facts, which, for the most part, are unknown on the basis of the existing record, fairly generate issues of constitutional dimension requiring a decision by this Court. *United States v. Automobile Workers*, 352 U.S. 567, 591 (1957). Mr. Chief Justice Hughes' lament concerning the Court's "self-inflicted wounds"⁷ covers several kinds of precipitate and unnecessary judicial consideration of constitutional issues, including the construction of statutory language in the vacuum of a barren record, as is the case here. Such concern has a special force when the Court is asked to strike down an Act of Congress, a co-equal branch of the Federal Government. *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953). And it remains unassailably true that the "best teaching of this Court's experience admonishes us

⁷Hughes, *The Supreme Court of the United States* 50.

not to entertain constitutional questions in advance of the strictest necessity." *Parker v. County of Los Angeles*, 338 U.S. 327, 333 (1949).

Amici accordingly urge that the case be remanded to the trial court, as suggested by the Solicitor General, and that any determination of the vagueness issue be deferred until the facts have been developed at trial.

B. *The Statutory Exemption Is Not Vague.* Again, there is not much that these *amici* can add to the Solicitor General's argument that the statute is not unconstitutionally vague and sets forth with reasonable clarity and sufficient particularity the kind of conduct which the statute penalizes and that which it exempts. The exempting phrase, "necessary for the preservation of the mother's life or health", clearly protects the District of Columbia physician who concludes in good faith that an abortion is necessary to preserve the mother's life or health, including mental health. *Williams v. United States*, 138 F.2d 81, 84 (C.A. D.C., 1943). Such is the precise interpretation which the highest court of the District of Columbia has given the statute now drawn into question in this case. *Williams v. United States, supra*. Under the circumstances, it appears particularly inappropriate to these *amici*, all doctors who have lived easily with the statute as thus defined, to ask that this Court now "parse . . . [the] statute as grammarians or treat it as an exercise in lexicography . . . [rather than reading] it in the animating context of well-defined usage." *Beauharnais v. Illinois*, 343 U.S. 250, 253 (1952).

Doctors, we assure the Court, are neither in doubt nor in fear as to where abortions permitted by the statute end and where those barred by it begin. For example, a recent study in California, whose abortion statute has an exception limited solely to cases where termination of the pregnancy is necessary to preserve the life of the mother,⁸ shows that there has never been a prosecution for an abortion performed in a hos-

⁸Cal. Penal Code § 274.

pital by a physician licensed to practice medicine in that State. Packer & Gamspell, *Therapeutic Abortion, A Problem in Law and Medicine*, 11 Stanford L.R. 418, 444 (1959). Other recent studies show the same has been true in New York and in Maryland. Hellegers, *Abortion, the Law, and the Common Good*, 3 Medical Opinion and Review, No. 5 (May 1967), p. 84. The amici are confident that this has also been the fact in the District of Columbia, and in that jurisdiction, as in the others, "the law has not gone out of its way to make things difficult for the physician, . . ." Indeed, if there is a more appropriate and familiar guide or standard than "preservation of life or health" to govern the practice of medicine generally we are unaware of it. In truth, it is the same standard which a doctor applies in making medical judgments in almost every aspect of his practice.

The studies cited in the preceding paragraph confirm the practical wisdom of then Judge Thurmond Arnold's observation, made 27 years ago, that it is "easy for the physician who directs an abortion in good faith to testify that it was necessary for health and such evidence would be extremely difficult to refute." 138 F.2d at 84. Thus, in the District of Columbia and, we feel certain, in most other American jurisdictions the so-called "doctor's dilemma", as Dr. Guttmacher once put it in reference to the "preservation of life" exception to state anti-abortion statutes,¹⁰ is purely a philosophical or subjective choice, the resolution of which has no adverse

⁹Hellegers, *supra* at 84. Indeed, a recent decision of the Court of Appeals for the District of Columbia Circuit suggests, should appellee prevail on this appeal, that any "doctor's dilemma" will not be whether he will be punished if he performs an abortion but whether he will be punished if he does not. *Mary Doe, et al. v. General Hospital of the District of Columbia, et al.*, C.A. No. 24,011. For a recent case showing this is not an illusory concern see *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967). Should doctors who object to performing abortions for social or economic reasons offered by women because such abortions offend either their religious, philosophical or professional convictions be exposed to serious civil liability?

¹⁰Guttmacher, *Therapeutic Abortion: The Doctor's Dilemma*, 21 Jour. Mt. Sinai Hosp. 111 (1954).

practical consequences, either in the administration of the criminal law or on the food faith practice of medicine. See, e.g., *Kudish v. Bd. of Registration in Medicine*, ___ Mass. ___, 248 N.E.2d 264, 266 (1969).

Perhaps it was partially because of his brilliant doctor-father that Mr. Justice Holmes was blessed with an eminently practical, as well as a superbly philosophical, turn of mind. In any event, his words, as in so many other areas of constitutional law, supply the answer to any claim of the alleged vagueness of 22 D.C. Code 201. Speaking for the Court in *United States v. Wurzbach*, 280 U.S. 396, 399 (1930), he said:

"Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk."

Here, too, Dr. Vuitch could not have been in any genuine doubt whether he was acting as a doctor or as an abortionist.¹¹ The Solicitor General is right in arguing that the trial court erred in holding the statute to be unconstitutionally vague on its face, and his decision should be reversed.

II.

THE COURT SHOULD NOT PASS UPON THE ADDITIONAL CONSTITUTIONAL CONTENTIONS ADVANCED BY APPELLEE

As he did in the trial court, the appellee again raises in this Court claims that the District of Columbia anti-abortion statute violates certain First and Fifth Amendment rights of his, and also impinges upon alleged Fourth, Fifth and Ninth

¹¹See also *Perkins v. North Carolina*, 234 F. Supp. 333, 336 (W.D. N.C., 1964), where it was held that the phrase "abominable and detestable crime against nature, with either mankind or beast" was not unconstitutionally vague, although if it had been a newly enacted statutory proscription it would have been.

Amendment "rights of privacy" possessed by a woman entitling her alone to make the untrammelled decision to terminate an unwanted pregnancy. As stated *supra*, p. 3, the District Court did not pass upon these particular contentions of the appellee.¹² Nor should this Court—for several reasons. These are: (1) the substantial doubt which exists regarding the appellee's standing to raise constitutional rights allegedly inhering in pregnant women; (2) the complete dearth in the record, both of the specific facts of this criminal case and of the broader medical and social facts which necessarily must attend resolution of the unique and far-reaching constitutional issues offered by the defendant; and (3) the pendency of other cases, one of which, before too long, surely will provide a more appropriate vehicle for an authoritative decision by this Court on such important issues.

A. *Appellee's Standing To Complain of the Alleged Constitutional Rights of Pregnant Women Is Doubtful.* Amici do not dispute Dr. Vuitch's right to argue that the statute impinges on (a) rights of free speech guaranteed him by the First Amendment and (b) the right to practice his profession which the Fifth Amendment protects.¹³ However, they have the gravest doubts that a purported abortionist has the proper standing to assert alleged, but as yet unestablished, rights of privacy on the part of pregnant women sufficient to permit them to authorize, on their own volition, the destruction of an unwanted, unborn child.

¹²The amici admit that these contentions or grounds, while not passed upon in the court below, technically may appear to have been preserved in this Court. *United States v. Raines*, 362 U.S. 17, 27 (1960). The matter, however, as the Solicitor General points out, is not free from doubt and if such claims represent "constitutional questions that are not yet precisely in issue" this Court, of course, will not consider them on the Government's appeal under the Criminal Appeals Act (18 U.S.C. 3731). *United States v. Petrillo*, 332 U.S. 1, 11 (1947).

¹³*Wilks v. Committee on Character and Fitness*, 373 U.S. 96, 102-03 (1963).

This Court many times has held that, in the absence of "weighty countervailing policies . . . a litigant may only assert his own constitutional rights or immunities." *United States v. Raines*, 362 U.S. 17, 22 (1960); *Barrows v. Jackson*, 346 U.S. 249, 255 (1953). Almost precisely in point would appear to be *McGowan v. Maryland*, 366 U.S. 420 (1961). In that case, the Court upheld the conviction of employees of a department store who had been found guilty of selling goods in violation of the state's Sunday Closing Laws. Concerning their contention that the Sunday Closing Laws violate the Free Exercise Clause of the First Amendment, as incorporated in the Fourteenth, the Court said:

"First, appellants contend here that the statutes . . . violate the constitutional guarantee of freedom of religion in that the statutes effect is to prohibit the free exercise of religion in contravention of the First Amendment, made applicable to States by the Fourteenth Amendment. But appellants allege only economic injury to themselves; they do not allege any infringement of their own religious freedoms due to Sunday closing. In fact, the record is silent as to what appellants' religious beliefs are. Since the general rule is that 'a litigant may only assert his own constitutional rights and immunities,' we hold that appellants have no standing to raise this contention. . . . Those persons whose religious rights are allegedly impaired by the statutes are not without effective ways to assert these rights. Appellants present no weighty countervailing policies here to cause an exception to our general principles." 366 U.S. at 429-30.

Similarly, in the case at bar no "weighty countervailing policies" require the drawing of an exception to the general rule that a party can assert his own constitutional rights but not those of others. If well established Free Exercise of Religion rights may not be vicariously asserted, surely alleged, unique, sweeping but, at this point in time, legally unrecognized rights on the part of a pregnant woman to terminate an unwelcome pregnancy for any reason should not be decided upon the urging of a stranger. *Tileston v. Ullman*, 318 U.S.

44, 46 (1943). No woman, pregnant or not, married or single, is a party to this litigation. For all the present enigmatic record ultimately may show, it is very possible that the woman upon whom Dr. Vuitch is alleged to have performed the abortion may turn out to be the chief complaining witness against him. A more direct conflict of interests would be difficult to arrange. Putting aside the irony of such a possible state of the facts, the circumstances of this case strike the *amici* as one where it would be almost offensively inappropriate to permit the appellee to stand in the constitutional place of the pregnant mothers of the District of Columbia, who, for one reason or another, wish to get rid of their unborn child.¹⁴ For reasons, the lack of standing on the part of the appellee to raise the "right of privacy" question should deter the Court from adjudicating it on this appeal.

B. The Record Is Not a Proper One To Serve As a Basis of Decision For the Additional Constitutional Objections Pressed by the Appellee. There is no question but that the additional constitutional issues which appellee would have this Court decide, as he has put it, in the interest of obtaining a "final definitive rule",¹⁵ raise novel constitutional issues of great magnitude. Their resolution will have a nationwide impact upon the law, the practice of medicine and the social mores of the

¹⁴Nor does *Griswold v. Connecticut*, 381 U.S. 479 (1965), argue against that proposition. In that case the doctor was convicted of aiding and abetting married couples in advising and prescribing the use of contraceptive devices prohibited by Connecticut law. The use of such devices was the principal crime in the commission of which it was charged that the doctor had aided and abetted. In the instant case the defendant was not charged with a crime which could *only* be committed by those whose rights he now purports to vindicate, *i.e.*, pregnant women wishing to destroy a fetus. Moreover, the language of 22 D.C. Code 201 (1967) implies that a mother could not be convicted of the crime of abortion on herself. Certainly there is no reported case in the District of Columbia which suggests that the prosecution has ever attempted to invoke the statute against an aborting mother.

¹⁵Appellee's Motion To Affirm, p. 19.

people. Before this Court succumbs to the temptation to resolve such issues now, it first must decide whether the instant case is the appropriate vehicle in which to do that.

The Court often has admonished that it will not decide important constitutional questions, however appealing, on the basis of an inadequate or amorphous record. *Ellis v. Dixon*, 349 U.S. 458, 462 (1955); *Wolfe v. North Carolina*, 364 U.S. 177, 194 (1960). More recent examples of the same prudent restraint may be found in *DeBacker v. Brainard*, 396 U.S. 28, 32 (1969), and *Powell v. Texas*, 392 U.S. 514, 521 (1968). In *Powell*, four members of this Court declined the opportunity to determine that the Cruel and Unusual Punishment Clause of the Eighth Amendment, as now incorporated in the Fourteenth Amendment, barred conviction of a chronic alcoholic for the crime of public drunkenness. Even more so than in *Powell*, *supra*, the record in the present case "is utterly inadequate to permit the sort of informed and responsible adjudication which alone can support the announcement of an important and far ranging new constitutional principle." 392 U.S. at 521.

The record in the instant case is deficient in two important respects. First, almost completely lacking are the specific facts on which the offense charged is based. The record shows only that the defendant is a licensed physician and was indicted for performing an abortion on a pregnant woman (A. 2). Missing are any facts as to: (1) whether the woman was married or unmarried; (2) whether she was an adult or a minor; (3) whether, if married, her husband knew of, and approved, the abortion; (4) whether the abortion was performed in a hospital, a doctor's office, a private home or a garage; (5) whether the fetus which was destroyed was 2, 25 or 35 weeks old; (6) whether the unborn child was biologically alive, viable or had "quickened"; (7) whether or not the life or health, including the mental health, of the woman was endangered if the abortion was not performed or whether the mother desired to terminate the pregnancy for economic or purely social reasons; and (8) whether or not the mother suffered any ad-

verse physical or mental consequences as a result of the abortion allegedly performed by the defendant.

Could such a total factual vacuum furnish the proper occasion for this Court to decide the grave issues urged by the appellee in the alleged interests of avoiding "costs and delay, prevent[ing] continued litigation on the substantive issues, and conserv[ing] judicial time and resources"? Putting it most mildly, the impoverished record which accompanies this appeal "hardly reflects the sharp legal and evidentiary clash between fully prepared adversary litigants which is traditionally expected in major constitutional cases." *Powell, supra* at 522.

Going beyond, however, the complete lack of specific evidentiary facts peculiar to the case itself, there also may not be found in this record a single jot of medical, fetological, physical, psychiatric, psychological, psychoanalytical, social or economic evidence or other relevant general facts which might bear on the question of whether the Constitution should be construed to vest in a pregnant woman the unfettered right to destroy her unborn child when she feels so disposed.

C. Two Additional Reasons for Declining Review. The prematurity or inappropriateness for decision of the issues that appellee seeks the Court to resolve on this barren record is further compounded by two other circumstances. First, the case has come here by direct appeal, pursuant to the Criminal Appeals Act, 18 U.S.C. 3731, and thus has not been subject to review by the United States Court of Appeals for the District of Columbia Circuit, in which court some of the constitutional arguments that underlay the novel issues tendered by the appellee might have been developed in more informative detail. It would appear by virtue of 23 D.C. Code 105 (1967) that the case could have been appealed to the Circuit Court of Appeals, and this Court's order of June 29, 1970 in this case suggests that it may be troubled that such an appeal route was not followed. *United States v. Sweet*, 38 U.S. Law Week 3520, June 30, 1970; *United States v. Burroughs*, 289 U.S. 159 (1933). *Amici* are

inclined to agree with the parties that the literal language of the Criminal Appeals Act tends to support this Court's jurisdiction of the appeal, at least so far as the issue of alleged vagueness is concerned. Nevertheless, the lack of intermediate review by the Court of Appeals of the District of Columbia Circuit furnishes another sound reason for this Court to decline review of other important constitutional issues which are not necessary for its decision and which are without the benefit of any factual record. Direct appeals under 18 U.S.C. 3731 are generally something "unusual, exceptional and unfavored, . . ." *Carroll v. United States*, 354 U.S. 394, 399-400 (1957); *United States v. Sisson*, 38 U.S. Law Week 4616, 4623, June 30, 1970. Especially should this be true when a direct appeal raises issues never considered or ruled on in the only court which heard the case prior to its arrival in this Court.

Finally, there is little doubt that the Court will have an opportunity quite soon enough to pass upon the question of whether the Constitution confers on women, or at least on married women, an unabridgeable right to terminate an unwanted pregnancy. Already pending in this Court is the appeal taken from the decision of a three-judge federal court in *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wisc., 1970), *app. pend.*, No. 297, October Term, 1970. *Babbitz* squarely raises the "right of privacy" question, the lower court having upheld such a right in striking down the Wisconsin abortion statute. In that case, there is a "great volume of legal, medical and biological evidence"¹⁶ bearing on the novel and important issue which the appellee asks the Court to decide in this case. *Amici* can also report to the Court that there are at least nine other cases, the majority of them three-judge federal court cases, in various postures of litigation, in which are raised, in several factual contexts, the same constitutional

¹⁶ Appellant's Jurisdictional Statement in No. 1729, October Term 1969, filed June 20, 1970, p. 21.

issues which the appellee would have the Court decide on the basis of the flimsy record out of which this appeal arises.¹⁷

For these several compelling reasons, *amici* respectfully urge that the Court decline to decide the additional constitutional issues which the appellee now raises in an attempt to convince the Court that the District Court's decision should be sustained, however it may decide the vagueness question.

III.

UNFETTERED AUTHORITY TO DESTROY AN UNBORN CHILD IS NOT A RIGHT OF WOMANLY PRIVACY BEYOND THE JUSTIFIED INTEREST OF AND REASONABLE REGULATION BY THE STATE

As the Solicitor General points out, the decision of the District Court may have created a situation where any licensed physician in the District of Columbia may perform an abortion on a pregnant woman who desires it for any reason whatsoever. Of course, if this Court should agree that the trial court erred in finding the statute vague on its face, such an unfortunate state of affairs would be rectified. However, if the appellee convinces the Court to accept his argument as to the alleged constitutional right of privacy on the part of a pregnant woman to destroy her unborn child for

¹⁷ Apart from the *Babbitz* case, there are three-judge federal court cases pending in the Northern District of Georgia (*Mary Doe, et al. v. Bolton*, C.A. No. 13676), the Northern District of Illinois (*Jane Doe, et al. v. Scott*, C.A. No. 70C395), the Southern District of Indiana (*Arnold, et al. v. Sendak, et al.*, C.A. No. IP70-C-217), the Eastern District of Kentucky (*Crossen v. Breckenridge*, C.A. No. 2143), Minnesota (*John Doe, et al. v. Randall, et al.*, C.A. No. 3-70, Civ. 97), New Jersey (*Young Men's Christian Ass'n of Princeton, N.J., et al. v. Kuglar*, C.A. No. 264-70), and the Northern District of Texas (*Jane Roe v. Wade*, C.A. No. 3-3690-B). A decision of the three-judge court, declaring the Texas abortion statute to be an unconstitutional invasion of the mother's right of privacy, was entered June 17, 1970. Two recent state cases have been decided, one in Massachusetts (*Commonwealth of Massachusetts v. Brunelle*, Superior Court for Middlesex Co., No. 8379), and another in South Dakota (*South Dakota v. Munson*, Circuit Court for Pennington County).

any reason she may have, then it is extremely doubtful that the District of Columbia or any state in the Union could pass a law regulating abortion, with the exception of requiring that abortions be performed by licensed physicians and, perhaps, that they take place in hospitals.¹⁸ The basic postulates from which the appellee's arguments proceed are: (1) that the woman's sovereignty or control over her own body is a right of privacy similar to other rights growing out of the marital relationship; and (2) this right cannot be interfered with by the state, at least in the form which the present District of Columbia abortion statute takes, since the state cannot demonstrate any competing substantial interest to justify its intrusion into that relationship.

The contrary assumptions which disprove the propositions urged upon the Court by the appellee and which are developed in more detail in the *amici's* brief are: (1) The state's interest in preventing the arbitrary and unjustified destruction of an unborn child now rests more securely than ever on the undisputed medical evidence, recently confirmed by the new science of fetology, that the fetus is a living, human being even in the very earliest stages of its development; (2) Whatever personal right of privacy a woman may have with respect to the use and disposition of her body must be balanced against the personal right of an unborn child to life; and (3) The District of Columbia abortion statute strikes a constitutional balancing of such rights.

¹⁸Even here, should the logic which underlies the appellee's basic position be carried just a bit farther, there may be serious doubt, despite the District Court's holding to the contrary, whether any right of unrestricted abortion could be limited to their performance in hospitals. If a woman has the "sovereignty over . . . her own body", which the appellee asserts, one could persuasively argue that she should be entitled to decide where the abortion is to be performed. Indeed, the appellee very recently stated publicly that "there was no need to restrict abortions to hospitals" and that his office, for one, "is equipped sufficiently to be considered a small out-patient clinic, . . ." The *Washington Post*, June 27, 1970, p. B-1.

A. *The State's Interest in Protecting the Rights of an Unborn Child Rests on a Proven Medical Basis.* Whatever the metaphysical view of it is, or may have been, it is beyond argument that legal concepts as to the nature and rights of an unborn child have drastically changed, based on expanding medical knowledge, over the last 2,500 years. In the ancient world, a child in the womb was considered as part of his mother.¹⁹ And up to the seventeenth century it was prevailing doctrine, based upon Aristotle's notion, that 40 to 80 days after conception the fetus underwent a transformation that placed him in the human class. This notion was successfully demonstrated to be medical nonsense as early as 1621.²⁰ Thereafter, the medical profession gradually accepted the view that no valid line could be drawn within the womb. The law followed, but dragged considerably behind, the medical lead. For example, as recently as 1921, the Court of Appeals of New York, with Judge Cardozo dissenting, could hold that when "justice or convenience requires, the child in the womb is dealt with as a human being although physiologically it is part of the mother, . . ." *Drobner v. Peters*, 232 N.Y. 220, 133 N.E. 567, 568 (1921).

At this point in time, however, there can no longer be sound medical facts offered to support the ancient notion that a fetus is "part" of his mother. The unassailable medical evidence to the contrary has now been convincingly confirmed by the findings of the new science of fetology, which came into existence by virtue of Liley's work on blood transfusions in the fetus.²¹ Some of the observations and opinions on the question held by the most eminent of doc-

¹⁹ This view was expressly incorporated in Roman law. Justinian, Digest 25.4.1.1.

²⁰ Zacchia, *Quaestiones Medico-Legales* 9.1 (1621).

²¹ "Liley's pioneering work not only has opened new avenues in the treatment of erythroblastosis fetalis, but has inspired the whole new sub-specialty of 'fetology' and created a need for fetological surgeons and fetological medical specialists for the future." Montagu, *Hemolytic Disease of the Fetus, Intra-Uterine Development* 443, 455 (A. Barnes ed. 1968).

tors specializing in the field may be of interest to this Court, although a more comprehensive discussion of the medical evidence is to be found in the *amicus curiae* brief filed in this case by Dr. Heffernan of Chicago, Illinois.

Professor Ashley Montagu of Columbia University has stated it very concisely:

"The basic fact is simple: Life begins, not at birth, but at conception.

"This means that a developing child is alive, not only in the sense that he is composed of living tissue, but also in the sense that from the moment of conception, things happen to him, even though he may be only two weeks old, and he looks more like a creature from another world than a human being—he reacts. In spite of his newness and his appearance, he is a living, striving human being from the very beginning."²²

It is now undisputed, for example, that the conceptus, or new fetus, possesses at the moment of its formation the so-called genetic code, the transmitter of all the potentialities that make men human, something that is not present in either their spermatozoon or ovum. Gottlieb, *Developmental Genetics* 17 (1966). At the moment conception takes place, scientists now generally agree "a new life begins—silent, secret, unknown."²³ Moreover,

"The child may be parasitic and dependent, but it is a functioning unit, an independent life. A child is

²²Montagu, *Life Before Birth* 2 (1964). Even if there is doubt whether the fetus can be recognized as a separate human being from the time of fertilization, there is no sound medical opinion which would deny that individual animate existence (or life) begins at the stage when the fetus separates or differentiates from the cells which will become the placenta. This development, called the blastocyst stage, occurs about six or seven days after conception. Cavanagh, *Reforming the Abortion Laws: A Doctor Looks at the Case*, *America*, April 18, 1970, p. 406.

²³Coniff, *The World of the Unborn*, *New York Times Magazine*, January 8, 1967, p. 41.

not, in the words of Mr. Justice Holmes, 'a part of its mother.' However visceral may be its temporary residence, however dependent it may be before birth—and for some years after birth—it is a living being, with its separate growth and development, with its separate nervous system and blood circulation, with its own skeleton and musculature, its brain and heart and vital organs."²⁴

A most vivid description of the fetus within the womb is found in the report of Dr. Liley and his wife, both pioneers of the new science of fetology. In 1967 they said:

"Because the fetus is benignly protected, warmed and nourished within the womb, it was long thought that the unborn must have the nature of a plant, static in habit and growing only in size. Recently through modern techniques of diagnosing and treating the unborn baby, we have discovered that little could be further from the truth.

"The fluid that surrounds the human fetus at 3, 4, 5 and 6 months is essential to both its growth and its grace. The unborn's structure at this early stage is highly liquid, and although his organs have developed, he does not have the same relative bodily proportions that a newborn baby has. The head, housing the miraculous brain, is quite large in proportion to the remainder of the body and the limbs are still relatively small. Within his watery world, however (where we have been able to observe him in his natural state by closed circuit x-ray television set), he is quite beautiful and perfect in his fashion, active and graceful. He is neither an acquiescent vegetable nor a witless tadpole as some have conceived him to be in the past, but rather a tiny human being as independent as though he were lying in a crib with a blanket wrapped around him instead of his mother."²⁵

²⁴Granfield, *The Abortion Decision* (1969), p. 25.

²⁵Liley, *Modern Motherhood* 26-27 (1967).

In District of Columbia medical circles, Dr. Hellegers has summarized the nature of the fetus during the first 12 weeks of its development as follows:

"After this second week of pregnancy the zygote rapidly becomes more complex and is now called the embryo. Somewhere between the third and fourth week the differentiation of the embryo will have been sufficient for heart pumping to occur, although the heart will by no means yet have reached its final configuration. At the end of six weeks all of the internal organs of the fetus will be present, but as yet in a rudimentary stage. The blood vessels leading from the heart will have been fully deployed, although they too will continue to grow in size with growth of the fetus. By the end of seven weeks tickling of the mouth and nose of the developing embryo with a hair will cause it to flex its neck, while at the end of eight weeks there will be readable electrical activity coming from the brain. The meaning of the activity cannot be interpreted. By now also the fingers and toes will be fully recognizable. Sometime between the ninth and the tenth week local reflexes appear such as swallowing, squinting, and tongue retraction. By the tenth week spontaneous movement is seen, independent of stimulation. By the eleventh week thumb-sucking has been observed and X rays of the fetus at this time show clear details of the skeleton. After twelve weeks the fetus, now 3-1/2 inches in size, will have completed its brain structure, although growth of course will continue. By this time also it has become possible to pick up the fetal heart by modern electrocardiographic techniques, via the mother."²⁶

And the trial court judge's father, an eminent child psychologist, concluded thirty years ago that the development of the fetus reflects "mental growth" as early as the fourth week.²⁷

²⁶Hellegers, *Fetal Development*, Vol. 31, No. 1, Theological Studies 7 (March, 1970).

²⁷Gesell, *The First Five Years of Life* 11 (1940).

It is for these medical reasons that the *amici*, like other doctors practicing their profession in good faith, treat the fetus or unborn child as a second patient, different from the mother. This is acceptable medical practice and is almost universally done in obstetrics. It is, perhaps, the only area of medical practice where a doctor treats two patients at the same time, taking that unique fact into account in his treatment of both patients.

Ordinarily, we would see no point in belaboring the scientifically obvious. Life begins at either conception or six or seven days thereafter; very early in its development, and much before "quickening" is manifested, the fetus manifests a working heart and a brain different from and independent of the mother in whose womb he resides; and an unborn fetus is a living, human being. Finally, even if it were still open to dispute as to whether life begins at conception or shortly thereafter, it is universally agreed that life has begun by the time the mother realizes she is pregnant and asks her doctor to prescribe an abortion. The *amici* have indulged in this short compilation of undisputed medical opinion only out of their concern that the Court might be tempted to take up and decide constitutional issues of the greatest magnitude without the advantage of familiarity with the relevant modern medical facts most germane to any such determination. Now, before they turn to the question of whether any alleged evolving right of privacy on the part of married women to do with their bodies what they will is constitutionally protected from application of an abortion statute such as 22 D.C. Code 201 (1967), despite the unrefuted medical data establishing that the fetus is a living person within the womb at conception or very soon thereafter, *amici* briefly refer to other areas of the law in which the legal rules or principles applicable to the rights of the fetus have substantially changed in response to knowledge acquired from the evolving biological data supplied by ever-improving and enlightened medical and scientific research.

B. *The Law's Recognition of the Property Rights of an Unborn Child.* The first area where the rights of the unborn child, at all stages of fetal existence, were recognized by the law was in the realm of property law. In *Doe v. Clarke*, 2 H. Bl. 399, 126 Eng. Rep. 617 (1795), the court interpreted the ordinary meaning of "children" in a will to include a child in the womb: "An infant *en ventre sa mere*, who by the course and order of nature is then living, comes clearly within the description of 'children living at the time of his decease'." In *Thelluson v. Woodford*, 4 Ves. 227, 31 Eng. Rep. 117 (1798), the court rejected the contention that this was a mere rule of construction invoked for the benefit of the child: "Why should not children *en ventre sa mere* be considered generally as in existence. They are entitled to all the privileges of other persons." *Ibid.* at 323. To the argument that such a child was a nonentity it replied:

"Let us see, what this non-entity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the statute of distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian." *Ibid.* at 322.

When the English property rules were adopted by American courts, the same approach was taken. In *Hall v. Hancock*, 15 Pick. 255 (Mass., 1834), the issue was whether a bequest to grandchildren "living at my decease" was valid, and the court was asked to say that "*in esse*" was not the same as "living" and that for a child to be "living", the mother must be at least "quick".²⁸ Chief Justice Shaw held that a conceived child fell within the meaning of the language and quoted with approval Lord Hardwicke in *Wallis v. Hodson*, 2 Atk. 117;

²⁸"Quickening" of the child means only that his presence in the womb is felt by the mother for the first time. Black's Law Dictionary 1415 (1951). "Quickening" served to prove the existence of life to common law men. Modern medicine now can prove the same existence long before it can be seen by the eye or felt by the mother.

"The principal reason I go upon is, that a child *en ventre sa mere* is a person in *rerum natura*, so that, both by the rules of the civil and common law, he is to all intents and purposes a child, as much as if born in the father's life-time."

In *In Re Well's Will*, 221 N.Y.S. 417 (1927), a trust fund originating from the estate of the deceased was to be divided into "as many parts as I have grandchildren living at the date of my decease." The decedent died on May 22, 1922; a granddaughter of the decedent was conceived on May 1, 1922. The granddaughter was held to be entitled to a share in the trust estate. See also *Swain v. Bowers*, 91 Ind. 307, 158 N.E. 598 (1927).

In the case of *La Blue v. Specker*, 358 Mich. 558, 100 N.W.2d 445 (1960), an unborn illegitimate child was held to be a child or "other person" having standing to bring suit under a dram shop act, for the death of his father, which had occurred before the child's birth. Quoting from *Ide v. Scott Drilling Co., Inc.*, 341 Mich. 164, 67 N.W.2d 133 at 135, the court in the *La Blue* case stated:

"For certain purposes, indeed for all beneficial purposes, a child *en ventre sa mere* is to be considered as born. . . . It is regarded as *in esse* for all purposes beneficial to itself, but not to another. . . . Formerly, this rule would not be applied if the child's interests would be injured . . . thereby, but for purposes of the rule against perpetuities such a child is now considered a life in being, even though it is prejudiced by being considered born. . . . *Its civil rights are protected at every period of gestation.*" (Emphasis supplied).²⁹

The foregoing approach has not been a sentimental concession to the supposed benefit of some forgotten posthumous child. The rule has been applied even where its application benefited some third party, *Barnett v. Pinkston*, 238 Ala. 327, 191 So. 371 (1939), and also in cases where the child himself has been injured by the rule, *In re Sankey's Estate*, 199 Cal. 391, 249 P. 517 (1926), in which a child conceived

²⁹ 100 N.W.2d at 449.

but not born was held bound by a decree entered against the living heirs.

The English and American common law doctrine under which an unborn child is considered as a "child" or as "in existence" for purposes of inheritance and trusts has long been followed in the District of Columbia. *Craig v. Rowland*, 10 App. D.C. 402 (1897).³⁰

These *amici* believe that it would be an ironic and an inexplicable perversion of both human and constitutional values if it were to be the law that the state has an interest in protecting the property rights of an unborn child, but has no constitutionally justifiable interest in regulating the circumstances and conditions under which such a child may be destroyed, *i.e.*, put out of existence and denied further life as a human being. Nor is it any answer to reply that the property rights of a fetus which are protected by the state are merely contingent and depend upon his having been born. It is only the *remedy*, not *the right*, which is contingent. Existence as an unborn child is the basis of the state's interest in granting and protecting the property rights of an unborn child. The fact that the child may not survive to enjoy those rights does not denigrate the state's interest or deny its authority to implement that interest by law, either as promulgated by legislatures or enunciated in judicial decisions. We should assume that the proposition would have special applicability when the state's interests and action are directed at insuring that the existence of life of the unborn child, and all such contingently enforceable property rights as he may possess, are not exterminated by his deliberate destruction, at least short of an overwhelming countervailing interest such as the protection of the life or health of another human being—the mother.

C. Evolving Rights Afforded an Unborn Child by the Law of Torts. Perhaps even more demonstrably so than in the case of purely property rights, including rights of inheritance, it is

³⁰The rule was recently applied in *Riggs National Bank v. Summerlin, et al.*, C.A. 187-69, Memo. Opinion (D. D.C., 1969).

in the law of torts where we witness a dramatic development, indeed, an abrupt change, of the law in response to expanding scientific knowledge and medical facts formerly unavailable.

Well into the twentieth century most American decisions denied recovery in tort to the human offspring harmed in the womb. The denial was based in part on the danger of fraudulent claims, in part on the difficulty of proving causation, but principally on the ground that "the defendant could owe no duty of conduct to a person who was not in existence at the time of his action", Prosser on Torts, Sec. 56 (1964). The theory followed was that succinctly expressed by Justice Holmes in *Dietrich v. Northhampton*, 138 Mass. 14, 17 (1884): "The unborn child was a part of the mother at the time of the injury."

There is no doubt of the sweeping nature of the reversal of the *Dietrich* doctrine that the unborn child is a part of the mother and therefore cannot sue for pre-natal injuries. Almost every jurisdiction which has considered the issue in the last 30 years has upheld the right of an infant to sue for injuries sustained prior to his birth. Prosser on Torts, Sec. 56; Gordon, *The Unborn Plaintiff*, 63 Mich. L.R. 579, 627 (1965). Moreover, it appears that a majority of jurisdictions now recognize that a wrongful death action may be brought for negligently inflicted injury to the unborn child resulting in its death, whether or not it was viable at the time of the injury, and whether born alive or still born. *Torrigan v. Watertown News Co.*, 352 Mass. 446, 225 N.E. 2d 926, 927 (1967); Harper and James, Torts, Sec. 18.3 (1956).

Many of the early cases required that the unborn child have reached the stage of viability (*i.e.*, capable of living outside of the mother's uterus) at the time the injuries were inflicted in order to maintain an action.³¹ The modern trend,

³¹ *Bonbrest v. Kotz*, 65 F. Supp. 138 (D. D.C., 1946); *Scott v. McPheeters*, 33 Cal.App.2d 629, 92 P.2d 678 (1939); *Tursi v. New England Windsor Co.*, 19 Conn. Supp. 242, 111 A.2d 14 (1955); *Damasiewicz v. Gorsuch*, 197 Md. 417, 79 A.2d 550 (1951); *Keyes v. Constr.*

and more in accord with the medical facts, however, has been to reject any distinction based on viability and to allow recovery whenever the injury was received, provided that the elements of causation are properly established.³²

The District of Columbia repudiated the notion that an unborn child must be considered as part of his mother and unable to sue for pre-natal injuries in *Bonbrest v. Kotz*, 65 F. Supp. 138 (D. D.C., 1946). Judge McGuire pointed out in that case that under the civil law and the common law of real property a child *en ventre sa mere* is regarded "as a human being . . . from the moment of conception—which it is in fact." Referring to the state of medical knowledge in 1946 and noting the resilient, unstatic features of the common law of torts, he found no difficulty in upholding the right of an unborn child to sue for damages in tort. 65 F. Supp. at 142.³³

Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S. 2d 696, contains language which summarizes precisely the basis of the rejection on the part of modern tort law of the anti-

Serv., Inc., 340 Mass. 633, 165 N.E.2d 912 (1960); *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio 144, 87 N.E.2d 334 (1949); *Mallison v. Pomeroy*, 205 Ore. 690, 291 P.2d 225 (1955); *Seattle-First Nat'l Bank v. Rankin*, 59 Wash.2d 288, 367 P.2d 835 (1962).

³²*Hornbuckle v. Plantation Pipe Line Co.*, 212 Ga. 504, 93 S.E.2d 727 (1956); *Daley v. Meier*, 33 Ill. App.2d 218, 178 N.E.2d 691 (1961); *Bennett v. Hymers*, 101 N.H. 483, 147 A.2d 108 (1958); *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960); *Kelly v. Gregory*, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953); *Sinkler v. Kneale*, 401 Pa. 267, 164 A.2d 93 (1960); *Sylvia v. Gobeille*, 101 R.I. 76, 220 A.2d 222, 223-24 (1966). "Viability" of a fetus is not a constant but depends on the anatomical and functional development of the particular baby. J. Morison, *Foetal and Neonatal Pathology* 99-100 (1963). The weight and length of the fetus are better guides than age to the state of fetal development, and weight and length vary with the individual. Gruenwald, *Growth of the Human Fetus*, 94 Am. J. Obstetrics and Gynecology 1112 (1966).

³³"The battle in jurisprudence is almost over. Development of the infant's right of action has illustrated the inherent capacity of legal systems to adjust to new situations." Gordon, *supra* at 627.

quoted notion of the common law that an unborn child is merely part of his mother's body:

"We ought to be safe in this respect in saying that legal separability should begin where there is biological separability. We know something more than the actual process of conception and foetal development now than when some of the common law cases were decided; and *what we know makes it possible to demonstrate clearly that separability begins at conception.*

"The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe the conditions under which life will not continue." (Emphasis supplied.)³⁴

The emergence of the rights in tort of unborn children is taken as a prime example of the effect of scientific development on law in the instructive book of Professor Patterson of the Columbia Law School — *Law In a Scientific Age* (1963). He concludes: "that the meaning and scope of even such a basic term as 'legal person' can be modified by reason of changes in scientific facts—the unborn child has been recognized as a legal person, even in the law of torts."³⁵

The revolution in tort law has thus, by the majority rule, recognized rights in the fetus at every stage of life and has refused to condition recovery on survivorship. The dean of authorities on tort law notes that all writers on the subject have maintained "that the unborn child in the path of an automobile is as much a person in the street as the mother." Prosser on Torts, Sec. 56. Can such a child become less a person when, instead of an automobile, another agency is directed to his destruction? If the state may protect this person by court action awarding damages for tort, *a fortiori* the

³⁴ 125 N.Y.S.2d at 697.

³⁵ *Id.* at 5.

state cannot be impotent to protect the same living being by criminal sanctions.

D. *The Law's Recognition of an Unborn Child's Right To Support.* It is now established that the law will recognize an unborn child's right to support by his parents. *Kyne v. Kyne*, 38 Cal. App.2d 122, 100 P.2d 806 (1940), involved a suit brought by the guardian *ad litem* of a fetus against the natural father. At the time the suit was instituted, the unborn child was less than six months old. The court held that both the father and mother of such a child owed him the duty of support. See also *People v. Yates*, 114 Cal. App. Supp. 782, 298 P. 961 (1931). And see *People v. Estergard*, ____ Colo. ____, 457 P.2d at 698, 699 (1969).

If the law holds that a state has a sufficient justification to require a father to support an unborn child which he may not want, can it be fairly maintained that the state has no justifiable interest in protecting that child from extinction as a living being because his mother may not want him?

E. *The Right of a Fetus To Life Has Been Preferred to His Parents' Free Exercise of Religion Rights.* Since this Court's decision in *Board of Education v. Barnette*, 319 U.S. 624 (1943), it has been firmly settled that the Free Exercise of Religion rights guaranteed by the First Amendment (as incorporated in the Fourteenth Amendment) are "susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." 319 U.S. at 639.³⁶ Nevertheless, the right of an unborn child to life has served in several recent instances to permit the state's abridgment of or interference with a mother's religious convictions, when necessary to save the life of an unborn child. One case touching upon, but not deciding, the point recently was decided in the District of Columbia. In *Application of the President and Directors of Georgetown College, Inc.*, 331 F.2d 1000 (C.A. D.C., 1964), *cert. den.*, 377 U.S. 978 (1964), the Court of Appeals upheld an order of the District Court authorizing a hospital to administer a blood transfusion

³⁶Emphasis supplied.

to a woman patient who, on religious grounds, was unwilling to consent to the transfusion and where the husband also was unwilling to consent, where the transfusion was necessary to save her life. The adamant mother had a seven months old child at the time the terrible dilemma arose. In resolving this Hobson's choice, Judge Wright said:

"The child cases point up another consideration. The patient, 25 years old, was the mother of a seven-month-old child. The state, as *parens patriae*, will not allow a parent to abandon a child, and so it should not allow this most ultimate of voluntary abandonment. The Patient had a responsibility to the community to care for her infant. Thus the people had an interest in preserving the life of this mother."³⁷

More precisely in point is *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421, 201 A.2d 537 (1964), *cert. den.*, 377 U.S. 985 (1964). There, a court was asked to decide whether the rights of a child in the mother's womb were violated by her refusal, on religious grounds, to submit to a blood transfusion necessary to preserve the lives of both. The New Jersey court found it unnecessary to decide whether an adult may be compelled to submit to medical treatment necessary to save his own life. However, the court had no difficulty, after finding a parity of rights possessed by both unborn and after born children, in deciding that the unborn child was entitled to the law's protection and ordering the transfusion. In sustaining the unborn child's right to life, even over his mother's right to practice her religion, the court said:

"In *State v. Perricone*, 37 N.J. 463, 181 A.2d 751 (1963), we held that the State's concern for the welfare of an infant justified blood transfusions notwithstanding the objection of its parents who were also Jehovah's Witnesses, and in *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960), we held that a child could sue for injuries inflicted upon it prior to birth. We are satisfied that the *unborn child is entitled to the law's*

³⁷331 F.2d at 1008.

protection and that an appropriate order should be made to insure blood transfusions to the mother in the event that they are necessary in the opinion of the physician in charge at the time." (Emphasis supplied).³⁸

Also worthy of relevant note in the context of a claim of a mother's right to freedom over the use of her body is *Gleitman v. Cosgrove*, 49 N.J. 27, 227 A.2d 689 (1967). In that case, the plaintiffs sought damages against doctors who had attended the mother during pregnancy. They alleged their child had been born with birth defects and that the defendants had negligently failed to warn the child's mother and father that an attack of German measles which she suffered during pregnancy might result in such defects. The failure to give the warning, it was alleged, deprived the parties of the opportunity of terminating the pregnancy. In affirming the trial court's dismissal of the complaint, the majority of the New Jersey Supreme Court emphasized the child's right not to be aborted, saying:

"The right to life is inalienable in our society . . . We are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of the single human life is the decisive factor in this suit in tort. Eugenic considerations are not controlling. We are not talking here about the breeding of prize cattle. *It may have been easier for the mother and less expensive for the father to have terminated the life of their child while he was an embryo, but these alleged detriments cannot stand against the preciousness of a single human life to support a remedy in tort.* Cf. Jonathan Swift. 'A Modest Proposal' in *Gulliver's Travels and Other Writings*, 488-496 (Modern Library ed. 1958).

³⁸201 A.2d at 538. This Court has had no trouble in sustaining as superior a state's interest in, and authority with respect to, children over their parents' free exercise of religion rights, noting that the "right to practice religion freely does not include liberty to expose . . . the child . . . to ill health or death." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1943).

"Though we sympathize with the unfortunate situation in which these parents find themselves, we firmly believe the right of their child to live is greater than and precludes their right not to endure emotional and financial injury." (Emphasis supplied).³⁹

The line of cases discussed in this section of *amici's* brief, all of which are based either impliedly or expressly on the findings of modern medical science concerning the nature of the fetus, are a recognition of the right of a child in the womb to the protection of the law. From this, a learned commentator has gone on to reason that:

"... it seems established by analogy that to remove the protection of the criminal law from the child in the womb would be itself an unconstitutional act. The civil rights cases have established that for the Government to fail to protect a class is itself an unconstitutional denial of civil rights."⁴⁰

The Court need not go so far in upholding the District of Columbia abortion statute against the appellee's claim that it unconstitutionally interferes with alleged rights of privacy possessed by a woman. Nevertheless, the point has force. It serves to emphasize that in evaluating the legitimacy of such an alleged right of privacy the Court must take into counter-vailing account the fundamental right of an unborn child to be protected by the state from arbitrary and capricious destruction of its existence merely because it is unwanted.

F. Life Should Be Preferred Over Privacy in Any Rational Hierarchy of Constitutional Values or Rights. In the section of the brief which now follows we take up the judicial balancing that is necessarily involved in deciding whether or not 22 D.C. Code 201 is an unconstitutional invasion of privacy. In deciding the relative priority which the Constitution should afford, on the one hand, to a woman's right to des-

³⁹ 227 A.2d at 693.

⁴⁰ Noonan, *Amendment to the Abortion Law: Relevant Data and Judicial Opinion*, 15 *The Catholic Lawyer*, No. 2 (Spring, 1969).

stroy her unborn child and, on the other, to the right of that child to live, certain relevant facts are beyond argument. First, the medical evidence is unchallengeable—life begins at conception, or within seven days thereafter, and the fetus very early in its development has an animate existence, including a heart and a brain, separate and independent from his mother. Secondly, the common law has not been impervious to the findings of modern science in changing and adjusting its concepts and rules regarding the legal rights possessed by a child in the womb.

We might also add at this point that the approach taken by American law in recognizing important legal rights of an unborn child is not some national aberration explained, perhaps, by some latent puritanical instincts in American society alone. For example, in 1959 the United Nations adopted a "Declaration of the Rights of the Child" which supplemented the United Nations' statement entitled the "Universal Declaration of Human Rights". One reason for this supplementary declaration, as stated in its Preamble, was because, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth". General Assembly of the United Nations, "Declaration of the Rights of the Child", adopted unanimously in the plenary meeting of November 20, 1959, *Official Records of the General Assembly*, 14th Session, pp. 19-20. Thus, the representatives of most of the civilized nations of the world recognized that the being before birth deserved recognition as a "child". They further recognized that a child, so defined, needed special legal protection. The committee report on this declaration noted that "representatives of the most diametrically-opposed social systems find common ideals in discussing the privileges of childhood". *Report of the Third Committee of the General Assembly, Official Records*, 14th Session, p. 593. The committee thus underlined that the rights asserted by the United Nations as applicable to the fetus represented a commitment which had commended itself to all of the various social systems represented within that worldwide body.

If, then, an unborn child can inherit by will and by intestacy, be the beneficiary of a trust, be tortiously injured, be represented by a guardian seeking present support from the parent, be preferred to the religious liberties of his parents, be protected by the criminal statutes on parental neglect, and enjoy the specific concern of the United Nations' General Assembly, are there not interests here which the state may guard from intentional extinction?

Let us then address ourselves specifically to the question of balancing the two rights which may appear to be in conflict in this case. That question must be: To what extent can the state protect the right of an unborn infant to continue its existence as a living being in the face of a claim of right of privacy on the part of a woman to decide whether or not she wishes to remain with child?

Amici will assume *arguendo* that the Constitution protects certain rights of privacy on the part of a woman arising from the marital relationship which cannot be unjustifiably interfered with by the state. They also believe that the genesis of such rights, to the extent such rights may exist, must be found among the "penumbral" personal liberties protected by the Due Process Clause of the Fifth Amendment. Yet equally unchallengeable is the proposition that an unborn child's right not to "be deprived of life", to quote the words of the Due Process Clause itself, is also a fundamental personal right or liberty protected by that same amendment and entitled to the traditional searching judicial scrutiny and review which is afforded when basic personal liberties are threatened by state action, whether legislative or judicial in character. Therefore, it is very clear that this case is not one, as the appellee would portray it, which involves merely the balancing of a right of personal liberty (*i.e.*, a married woman's privacy) against some competing state interest of lower priority or concern in an enlightened scheme of constitutional values, such as the state's police power, its authority to promulgate and enforce the criminal law, its right to protect the public health, *etc.* Rather, the

choice here is between a nebulous, and as yet unrecognized, legal "right" of privacy on the part of a woman with respect to the use of her body and the state's right to prevent the unjustifiable destruction of a human life. Accordingly, the appellee's complaint of the alleged "over breadth" of the District of Columbia abortion statute has no relevancy to the decision. The issue is purely a determination as to which of two *personal* rights or liberties the state has elected to prefer in particular circumstances where those rights come into conflict and if, under such circumstances, that judgment is a prohibited exercise of legislative power.

There would be no question of the answer, of course, if the choice were between a woman's "right to privacy" and the destruction of an unwanted *after* born child. Yet there is a point at which abortion may approach infanticide. The recent findings of medical science now suggest that this point is reached, at least from a medical, if not a legal, point of view, very early in a woman's pregnancy and in the life of the unborn child within the womb. Acting in this troublesome area, Congress has chosen, in the words of Judge Arnold, to effect "a compromise between morals and hygiene far in advance of the law in most jurisdictions", a majority of which still permit abortion only to save the life of the mother. *Williams v. United States*, 138 F.2d at 83. Contrary to the appellee's assumption, the state's interest in regulating abortion, as it has done in 22 D.C. Code 201, is not bottomed exclusively on concern for the health of the mother, a concern which admittedly would be of less than persuasive effect, since it cannot be successfully established that abortions during the early period of pregnancy performed by competent physicians in hospital surroundings represent a substantially high medical risk to the life and health of the mother.⁴¹ The state interest which

⁴¹ *Amici* have one grave reservation here, however. Evolving research into the complications that may follow abortion indicate a 2% sterility rate with an approximate 10% rate of moderate or severe psychic sequelae. Hellegers, *Abortion, the Law, and the Common Good*, 3 Medical Opinion and Review, No. 5 (May 1967). Indeed, respect-

justifies what the Congress has done rests on a concern for human life, even though that life be within the womb of the mother. The separate, early and independent existence of such life has now been proven by medical science. While it may be impossible for the state to insist on the protection of such a life under all circumstances, can it seriously be maintained that the government is powerless to insist on protecting it from intentional destruction, absent danger to the mother's life or health?

The exception which the D.C. statute permits for the preservation of the mother's life is a reasonable consideration which justifies the state in permitting abortion for this purpose. "In the rare case where choice must be made between them, reason cannot demand that the mother must prefer her unborn child's life to her own." Noonan, *The Constitutionality of Regulation of Abortion*, 21 Hastings L.J. 51, 60 (1969). The second exception authorized by the D.C. Code in the interests of preserving the health of the mother is more difficult to defend in the light of *amici's* major medical premise, *i.e.*, that an unborn child is a living human being separate and apart from his mother. Yet, here also there is analogy to be found in the usual rule of criminal law which treats as justifiable homicide, killing done to repel a threat of substantial bodily injury. Thus, where a pregnancy constitutes a threat to the duration of the life of a mother by grave impairment of her health, there is a conflict between her interests in being free of such impairment and the fetus' interest in life. The statutory resolution of that conflict is not clearly unreasonable.⁴² At any rate, no such conflict is presented by the record here, nor is the reasonableness of the statute in resolving it an issue in this case.

able studies raise the question of whether the guilt complex evoked by an abortion may itself constitute a more severe psychiatric problem than any pre-existing mental health problem serving to justify the abortion in the first instance. Rosen, *Therapeutic Abortion, Medical, Psychiatric, Anthropological and Legal Considerations* (1954).

⁴²Noonan, *supra* at 61.

Under the analysis set out above, the appellee's argument in support of a woman's "sovereignty . . . over the use of her body" quickly withers. Either (1) it means that she has a "private right" or personal freedom which permits her to decide, for any reason whatsoever, whether to sustain and support, or whether to eliminate, a life which she alone may decide is unwanted; or (2) it means that she has some kind of right to bodily integrity which permits her and her alone to decide under all circumstances whether either to retain, or permit to be destroyed, a function or organism contained within her own body.

In all fairness we doubt that the first is the correct understanding of the basis of the "private right of personal freedom" for which appellee contends. For, were that principle ever to be accepted as the law, there would have crept into the Constitution a potentially terrifying principle that, with very little more logic than the appellee has relied upon to sustain his position in this case, would equally justify infanticide and euthanasia, at least if the victims were those in a relationship of dependence with the person or persons who wished to destroy them. Nor would the laws which forbid abandonment, failure of support, child neglect, *etc.*, be immune from attack.

However, we believe that the appellee means only to maintain that a woman has a right to an integrity of her body sufficient to permit her alone to decide, for whatever reason, whether to terminate a pregnancy. There are no decisions of this Court which suggest the existence of such an unrestricted right of bodily integrity. For example, it decided in *Schmerber v. California*, 384 U.S. 757 (1966), that it was not unconstitutional to require the forcible extraction of blood from a drunk driving suspect. Other courts have upheld police-supervised forcible rectal examinations, extraction of urine, and administration of emetics on criminal suspects. *Annotation*, 16 Law Ed.2d 1332, 1338-43 (1967).⁴³

⁴³See also the *Georgetown College* and *Raleigh Fitkin* cases discussed *supra*, pp. 34-36; cf. *Babbitz v. McCann*, 306 F. Supp. 400 (E.D. Wisc., 1969), *app. pend.*, No. 297, October 1970 Term.

We show in the next subsection of this brief that the one decision on which appellee might rely, at least by attenuated analogy, to support his claim of the unfettered right of a married woman to terminate a pregnancy does not support the proposition in whose behalf it is summoned. Apart from that, however, we do not believe that it can successfully be maintained that the District of Columbia abortion statute, and the balancing between any alleged right of privacy and the right of an unborn child to life which it attempts to effect, can be struck down as unconstitutional. To reach the contrary result would require this Court's unabashed return to the long-repudiated concept of substantive due process which plagued its decisions for several generations, albeit in another context, *i.e.*, economic and social legislation. The fact that a law might not impress the judiciary as a good law, or might even appear on the silly side to them, no longer can serve as a basis for its invalidation.⁴⁴ There is no doubt that many doctors, many women and many citizens might regard the District of Columbia statute on abortion as illiberal, outmoded and inconsistent with the law's emancipation of women. Such a view may enjoy significant popular appeal, although a recent national poll on the subject indicates that it is not a majority view.⁴⁵ However, at this stage of American constitutional development we don't have to remind the Court that the predilections of the populace, even those of its most enlightened members, much less the individual preferences of judges, cannot serve as a basis to strike down legislation within the competence of the state to enact, especially where the legislation thus challenged is aimed at protecting the most fundamental of personal liberties protected by the Due Process Clause, *i.e.*, the right not to "be deprived of life".

⁴⁴Compare *Lochner v. New York*, 198 U.S. 45 (1905), with *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

⁴⁵"On an overall basis, the country is 50-40 percent opposed to the passage of state laws 'permitting abortion for almost any reason'." *Washington Post*, June 22, 1970, p. C-6.

G. *No Precedents of This Court Afford a Basis for Preferring Privacy Above a Right to Life.* Appellee states and purports to rely on the undisputed proposition "that the Constitution protects certain privacy and family interests from government intrusion unless a compelling substantial interest exists for the legislation."⁴⁶ These *amici* have demonstrated the medical basis which supports the "compelling substantial interest" reflected in the District of Columbia abortion statute. Beyond that, however, they dispute the contention that a woman enjoys any right of privacy, as yet recognized in American law, which vests in her alone authority to terminate a pregnancy for any reason whatsoever.

Certainly, no precedents of this Court have gone so far. Of the decisions relied on by the appellee, all but one are manifestly insufficient to establish the existence of such a formidable and unabridgeable alleged right of privacy. For example, *Loving v. Virginia*, 388 U.S. 1 (1967), cited by the appellee, held that a state anti-miscegenous marriage statute violated the Equal Protection Clause of the Fourteenth Amendment. 388 U.S. at 12. As a supporting ground for its decision, the Court also found that such statutes deny due process, since "the freedom of choice to marry [can] not be restricted by invidious racial discrimination." *Ibid.* *Loving*, therefore, is no precedent in support of the appellee's notion of the extreme scope of a woman's constitutional right of privacy. It is purely an invidious racial discrimination holding.

Other cases on which the appellee relies must similarly fail in their role as alleged analogies for his position. *Skinner v. Oklahoma*, 316 U.S. 535 (1942), decided that the compulsory sterilization of some types of habitual criminals and not others represented an invidious discrimination condemned by the Fourteenth Amendment. Thus, *Skinner* is most accurately read as a case prohibiting the imposition of unreasonable impediments on the right to procreate and, in any event, cannot logically be stretched to serve as any

⁴⁶ Appellee's Motion To Affirm, p. 26.

analogy for the unrestricted right to abort. Likewise missing the mark as a supporting precedent is *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). This was the Court's landmark decision upholding, over the requirements of a state's compulsory school attendance law, the freedom of parents, guaranteed by the Due Process Clause of the Fourteenth Amendment, "to direct the upbringing and education of [their] children" 268 U.S. at 534. Once more, the liberty which was protected in the *Pierce* case was not a "right of privacy" and again the legislation which was struck down had "no reasonable relation to some purpose within the competency of the State." 268 U.S. at 535.

When the obviously unanalogous authorities tendered by the appellee are put aside, he is left only with *Griswold v. Connecticut*, 381 U.S. 479 (1965), as the one slim reed of alleged precedent to which he clings in arguing for the awesome right of privacy which he would have the Court enunciate in this case. That decision, too, is insufficient to carry such a heavy burden. The *Griswold* case produced a number of opinions by the Justices of this Court, concurring and dissenting. The actual holding in the case, however, was that a statute which forbade the use of contraceptives by married couples violated a "penumbral" right of marital privacy, older than the Bill of Rights and one falling within a "zone of privacy created by several constitutional guarantees." 381 U.S. at 485. Three of the Justices who decided that case, two dissenting and one concurring, refused to recognize any constitutionally protected right of privacy whatsoever. The remaining six Justices agreed only that a law, the enforcement of which would require the invasion of the marital bedroom, transgressed on the intimacies of, and the right of privacy inherent in, the marital relationship.

The particular aspect of the marital relation with which the Connecticut statute at issue in *Griswold* interfered was the sexual relationship. The state made it criminal for a married couple to have sexual intercourse using contraceptives. Enforcement of the statute would have required actual invasion of the marital bedchamber. The Connecticut law

challenged was more stringent and sweeping than any statute, civil or ecclesiastical, in the history of social efforts to control contraception. Noonan, *Contraception* 491 (1965). In contrast, 22 D.C. Code 201 does not affect the sexual relations of husband and wife. Pregnancy does not interfere with these relations except under some circumstances at limited times; indeed some women are more desirous of intercourse in pregnancy. Guttmacher, *Pregnancy and Birth* 86 (1960).

Further, it is a distortion of both the "penumbral" and Ninth Amendment approaches relied on by the majority in *Griswold* to assert them as a basis for challenging state regulation of abortion as unconstitutional. Centuries of judicial and legislative history refute the argument that the unrestricted right to abort is an "emanation" of any specific guarantees of the Bill of Rights necessary to give them "life and substance". 381 U.S. at 484. Where, for example, after considering the "traditions and [collective] conscience of our people", will this Court find the right to unrestricted abortion a principle "so rooted [there] . . . as to be ranked as fundamental"? 381 U.S. at 493 (Goldberg, J. *concurring*). Rather, in the words of a state court on the subject, the tradition has been that: "Unnecessary interruption of pregnancy is universally regarded as highly offensive to public morals and contrary to public interest." *Miller v. Bennett*, 190 Va. 162, 169, 56 S.E.2d 217 (1949).

In relying on the *Griswold* case, the appellee never considers that in this case, as opposed to that decision, there is another important interest at stake, the life of an unborn child. If, despite all the medical evidence on the point, the unborn child is not to be considered a juridical personality with legally protectible interests, then *Griswold* could be regarded as a precedent for the result that the appellee urges this Court to reach. On the other hand, if terminating pregnancy is something different from preventing it, if abortion is different from cosmetic surgery, if the fetus is not in the same class as the wart, and if we are dealing with something other than an inhuman organism, then *Griswold* is

totally inapposite. Even if the fetus is not fully the equivalent of the born child, the law, through centuries of judicial decision and legislation, and following the lead supplied by medical science, has raised the equivalency of that life to such a status that the unborn child may not be deprived of it, absent the demonstrated necessity of protecting a reasonably equivalent interest on the part of the mother. *Griswold*, of course, presented no such conflict and therefore is not controlling in this case.

Finally, we call the Court's attention to the fact that at common law abortion, at least after "quickening", was a form of homicide. 2 Bracton, *De Legibus et Consuetudinibus Angliae* 278-79 (Twiss ed. 1879). The "quickening" requirement originated with Coke and was predicated on the limited, inadequate and erroneous medical knowledge of his day. "Quickening" was the first manifestation of animate life within the womb of which common law men could be certain. However, as early as 1803, when the first English statute on abortion was passed, the requirement of "quickening" was removed and all abortions were prohibited, although the penalties were more severe if the abortion was performed after the fetus had quickened. Miscarriage of Women Act (1803), 43 Geo. 3 c. 58. Any proposition holding that, by virtue of passage of the Ninth Amendment, there was reserved to pregnant women a "penumbral" constitutional right to abort for any reason whatsoever on the ground that such a "right" was a fundamental liberty, recognized before the Bill of Rights, and retained by them is without any basis in history or in either British or American constitutional development. Far from considering it a "right", the common law treated abortion as a serious criminal act. And as soon as medical science had proved that an animate organism existed in the womb prior to "quickening", the Parliament quickly adapted the findings of that science as the basis of the abortion statute which it passed in 1803, *supra*.

Thus, on any fair analysis, the appellee's alleged precedents, including *Griswold*, furnish no support for his claim that there is a constitutional basis for a woman's right of

privacy in aborting, for any reason, an unborn child which she does not want.

IV.

THE REMAINING ARGUMENTS ADVANCED BY THE APPELLEE ARE WITHOUT MERIT

In addition to his major claim that the statute involves a woman's "right of privacy", appellee argues that First Amendment and Equal Protection considerations, as well as concern for the public welfare, require invalidation of 22 D.C. Code 201. *Amici* deal briefly with these contentions in this concluding section of their brief.

A. *The Statute Does Not Abridge a Doctor's First and Fifth Amendment Rights.* Appellee makes a weak pass in attempting to assert a First Amendment right in this case. He argues that the "present action has First Amendment implications, namely the right of a physician to provide medical information, followed by treatment of his patients" ⁴⁷ The dispositive answer to such a contention is that the defendant was indicted not for speech, or even for giving medical advice, but for the commission of a criminal act, an abortion barred by the statute. If, as *amici* maintain, such an abortion is one within the competency of the District of Columbia to proscribe as criminal conduct, then the argument is closed. A criminal act does not fall within the "freedom of speech" which the First Amendment protects. *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490, 498 (1949). On the other hand, if the *amici* are wrong and the District of Columbia statute represents an unconstitutional invasion of a woman's right to privacy, the appellee's free speech argument becomes superfluous. Apart from that, however, Dr. Vuitch cannot seriously argue that the District of Columbia abortion statute is vulnerable on its face as abridging his, or anyone else's, right of free expression.

The identical rationale also answers the defendant's claim that his "general liberty under the Fifth Amendment to

⁴⁷ Appellee's Motion To Affirm, p. 20.

practice his profession free from unconstitutional restraint" is offended by the statute. Compare, *e.g.*, *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 44 (1961), with *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 102-03 (1963).

B. Nor Does the Statute Effect Any Invidious Discrimination Between Rich and Poor. It does not appear that the appellant complained below that the abortion statute violated the Equal Protection Clause of the Fourteenth Amendment. Nevertheless, in his motion to affirm he argued that the abortion statute, as interpreted, denies "abortions to the poor, thus adding a gross factor of statutory discrimination to those hardships which the government is otherwise trying to correct."⁴⁸

We doubt that this contention rises to the level of a constitutional argument which must be dealt with in this case. If it were necessary, we would point out that the statute on its face applies to all persons committing the acts condemned by the statute and that there is no suggestion that it seeks to discriminate on any invidious basis, including that of income. Of course, departing from the facts of the case, it might be argued more generally that (1) the poor woman finds it more difficult than a rich woman to leave the District in order to get an abortion in a jurisdiction where it might be legal, and (2) she cannot afford treatment by a private physician who, some might say, would be more inclined to find a legal reason for the abortion. Hence, it might be argued that the statute bears unequally upon the poor. The same theoretical argument could be made of many types of conduct proscribed by the criminal law of the District of Columbia. There are jurisdictions to which wealthy persons may travel in order to indulge in the doubtful pleasures of gambling at will, using narcotics without restraint, and enjoying a plurality of wives. Could this doubtful "advantage" on the part of the rich be relied on as any basis to set aside

⁴⁸ Appellee's Motion To Affirm, p. 39.

the criminal statutes of the District of Columbia proscribing such activities within the jurisdiction?

And even if it were assumed to be true that the rich are more likely than the poor to secure the services of a sympathetic physician for purposes of terminating an unwanted pregnancy, such a result, unintended by the statute, would not rise to the level of a constitutional infirmity. "It is no requirement of equal protection that all evils of the same genus be eradicated or none at all." *Railway Express Agency v. New York*, 336 U.S. 106, 110 (1949). If the statute is to fail, it must be shown that on its face it takes away a right guaranteed to the poor by the Constitution. *Fisch v. General Motors Corp.*, 169 F.2d 266, 270 (C.A. 6, 1948). No such showing is possible in this case.

Along with many others, these *amici* lament the fact that Anatole France's sardonic comment about the "majestic equality" of the law much too often has proved to be true. There is no question that many criminal laws in actual practice bear with unequal severity upon the poor. It is they who are more likely than the rich to be caught, to be unable to post bail bond, to be prosecuted, to be unskillfully defended, to be convicted and to be punished. However, the remedy for these injustices of our society lies in the elimination or mitigation of the conditions and causes of poverty and in the reform of the administration of criminal justice, not by the selective invalidation of otherwise lawfully enacted criminal statutes. The District of Columbia abortion statute is not directed against the poor, as opposed to the rich, but against practitioners of illegal abortion who perform their invidious services for a substantial price. It would seem, therefore, that the appellee is in as peculiarly unworthy a position to assert alleged constitutional rights possessed by the poor as he is to champion the alleged constitutional rights of pregnant women in the District of Columbia.

C. Their Persuasiveness Apart, Appellee's Common Good Arguments Are Misplaced. At the finish the appellee argues, unsurprisingly, that the statute is a bad one from the point

of view of the public welfare. He contends that the D.C. abortion statute forces women often to go to non-medical practitioners for the performance of abortions which are not conducted under proper hygienic conditions.⁴⁹ Next, he calls attention to the grave problem of overpopulation, both on a national and worldwide scale.⁵⁰

The efficacy of these arguments is very questionable, but, in any case, their assertion here is misplaced. They should be directed to the Congress, not to this Court. Certainly, in recent years legislative bodies have not been hostile to the idea of revising their abortion statutes.⁵¹

Even if such arguments were addressed to a legislative body, these *amici* would dispute their persuasiveness. For example, Sweden, a country not unlike ours, and the nation which has had the longest experience with state-regulated abortions in Western Europe, has produced no evidence that criminal abortions, estimated at 20,000 a year when the law was passed in 1938, have been substantially reduced since that time. Uhrus, *Some Aspects of the Swedish Law Governing Termination of Pregnancy*, *The Lancet* 1292 (1964). Other studies confirm the belief that liberalization of abortion laws effect no reduction in the rate of criminal abortions and all that is done is to increase the total number of abortions. "Thus it is not unlikely that liberalization may increase rather than decrease maternal mortality." Cavanagh, *Reforming the Abortion Laws: A Doctor Looks at the Case, America*, April 18, 1970, p. 408. Secondly, so far as

⁴⁹*Id.* at 40. However, recent reliable statistics show a significant annual decline, both nationwide and in the District of Columbia, of deaths caused by abortion. Hellegers, *supra* at 90.

⁵⁰*Id.* at 41.

⁵¹For example, New York recently enacted an abortion statute which permits abortion for any reason within 24 weeks from the commencement of pregnancy. That act became effective on July 1, 1970. *New York Times*, July 2, 1970, p. 1. Laws almost, but not quite, as liberal as the New York statute have recently been approved in Alaska and Hawaii.

the problem of overpopulation is concerned, an abortion, whether on the free demand of a woman or on the intimidating command of the state, appears to us as a completely ineffective and, indeed, an extremely dangerous, way to attempt to solve that problem, at least in the context of values traditional to Western civilization. For instance, one side effect of the repeal of abortion statutes and the fostering of abortion through state auspices is that no group will be more likely to feel the sting more bitingly than the mothers of illegitimate children. Already, laws making the birth of illegitimate children a crime suggest the squeeze to which the poor mother might be subjected in an age of unrestricted, and state-sponsored, abortion.⁵² However, this Court is not the forum, and this case is not the occasion, to determine whether unrestricted abortion would best serve the general welfare of the people of the District of Columbia. Such a debate, if it must come, will be for the Congress to decide, not this Court.

⁵²E.g., La. Rev. Stat. Ann. § 14.79.2; see Noonan, *Freedom To Reproduce: Cautionary History, Present Invasions, Future Assurance*, Biennial Conference on the "Control of One's Own Body", New York University, New York (1970).

CONCLUSION

For the reasons stated in their brief, the *amici* join the United States in urging that the Court reverse the judgment of the District Court and remand the cause for the reinstatement of the indictments against the appellee.

Respectfully submitted,

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